identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

B5

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: **MAR 1 5 2010**

SRC 08 070 50373

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

In this decision, the term "prior counsel" shall refer to [redacted] who represented the petitioner at the time the petitioner filed the petition. The term "counsel" shall refer to the present attorney of record.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. At the time he filed the petition, the petitioner was a global capital market expert at Wachovia Capital Markets (renamed Wells Fargo Securities in 2009). He has since begun working for Credit Suisse Securities USA, LLC. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel and exhibits relating to the petitioner's compensation and his employers. Counsel protests that the director did not issue a request for evidence prior to denying the petition. Issuance of such a request is discretionary. If all required initial evidence has been submitted but the evidence submitted does not establish eligibility, U.S. Citizenship and Immigration Services (USCIS) may deny the application or petition for ineligibility. 8 C.F.R. § 103.2(b)(8)(iii).

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now USCIS] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the petition on December 26, 2007. In arguments submitted with the initial filing, prior counsel stated:

> [The petitioner] has played a significant role in the field of International Investment Management, specifically Global Capital Markets, by attracting extremely difficult-to-acquire Latin American investments into the United States. His accomplishments in the field are a testament to the substantial benefits [the petitioner] will continue to provide to the U.S. national interest. Additionally, what distinguishes [the petitioner] from other individuals in the field is his rare combination of expertise in international investment management and his valuable network of high net worth clients from Latin America. This unique combination of expertise has enabled [the petitioner] to direct influential investors to invest in the U.S. economy. Since investor habits in Latin America vary markedly from those in the United States, global investment strategists must be able to navigate the diverse cultural demographics of capital source markets such as Latin America.

(Emphasis in original.) The petitioner submitted several witness letters with the petition. [redacted] stated:

> I am the Director of Fixed Income Institutional Sales for Wachovia Capital Markets, LLC for the South-East US, Latin America and the Caribbean. . . .
>
> [The petitioner] is widely recognized for his work in global capital markets due to his comprehensive knowledge of the U.S. and Latin American markets. Throughout his career, [the petitioner] has made important contributions to the field, facilitating a crucial inflow of foreign investment into the United States by successfully leading some of the largest Latin American institutions to invest hundreds of millions of dollars in the United States.
>
> These investments increase the amount of capital for U.S. business operations, as well as revenue for the U.S. government. . . .
>
> Due to [the petitioner's] standing in the field and his past record of accomplishments, Wachovia Capital Markets has selected him to advise and sell U.S. asset-backed securities (ABS) to corporations in the US and Latin America. His expertise has been instrumental in the bank's participation in the consumer ABS bonds backed by Auto, Credit Card, and Equipment assets.

[redacted] stated:

> I am the International Banking Operation Supervisor for *Petróleos de Venezuela, S.A.* (PDVSA), a Venezuelan state-owned oil company and one of the main oil suppliers for

the United States. . . . In my capacity as International Banking Operation Supervisor, I am responsible for managing PDVSA's liquidity position, which includes investing in U.S. money-market instruments. It is in my position as International Banking Operation Supervisor that I became aware of [the petitioner] as a leading experts [*sic*] in global capital investment management.

. . . [The petitioner] possesses a rare level of knowledge related to both the U.S. financial markets and the needs of Latin American investors. As a result, [the petitioner] is capable of adding a considerable amount of value to our portfolios by explaining the risks and advantages of the U.S. market in a manner that is informed by his understanding of Latin American investment practices. . . .

[The petitioner] serves in a leading role in the Institutional Sales Group of the Fixed Income Division of Wachovia Capital Markets, one of the world's foremost investment banking institutions. . . . In his leading position, [the petitioner] is well known for advising and executing trades with the international funds of large institutional investors. . . . For these high-level clients, [the petitioner] provides expert advice and consultancy, identifies the best investment options, and facilitates trades in U.S. fixed income investments. . . .

Due to his stellar reputation in fixed income capital markets knowledge, I have relied upon [the petitioner's] advice in the management of PDVSA's institutional investments. At any given time, PDVSA maintains an average balance of $80 million in Wachovia Capital Markets accounts, which consists of the PDVSA's investments in U.S. money-market instruments. In his leading role in the Institutional Sales Group, [the petitioner] has enhanced PDVSA's portfolio, accurately advising the company on U.S. money market opportunities. . . .

[The petitioner] is one of a few investment managers who possesses the necessary level of expertise in providing profitable financial advice to the largest institutional investors, such as PDVSA, that wish to invest their revenues in the United States. His reputation for success in investment circles has made possible the inflow of investment capital into the United States.

[redacted] stated:

As Treasury Officer for the Panama Canal Authority, my duties include investing on behalf of the Panama Canal in fixed income securities and deposits, denominated in US Dollars, to maximize returns consistent with the company's requirements. The Panama Canal Authority is one of the largest Latin American investors and has made more than USD $1 billion in high liquidity investments in United States of America dollars. I am responsible for evaluating the best investment options. . . . In this position, I have had the opportunity to evaluate the most skilled capital markets and professionals in the

global market. I can without hesitation endorse [the petitioner] as an individual of extraordinary ability in the field of international investments, with particular expertise in U.S. fixed income investments.

Within the field of global capital markets, [the petitioner] is widely recognized for his comprehensive expertise in identifying, evaluating and advising institutional clients on various sectors within the fixed income world. . . . [H]e is a crucial figure behind the Authority's investments in introducing us to U.S. asset-backed securities (ABS). . . . To date, the Authority has purchased over $142 million of fixed income instruments consisting of U.S. corporate bonds and ABS at the direction of [the petitioner].

Of equal importance, [the petitioner] has served in a leading role as one of the Authority's expert advisors during the restructuring of our investment policies.

[redacted] stated:

I am the Senior Portfolio Manager for [redacted] and a Vice-President of ADP's Investment Operations in Wilmington[,] Delaware. . . .

As a Senior Portfolio Manager, I manage the largest portion of ADP's bond portfolio. . . . It was in my position as Senior Portfolio Manager of ADP that I became aware of [the petitioner's] reputation as one of the most respected experts in certain sectors of fixed income investments.

[The petitioner's] impeccable reputation in the field is largely attributable to his unmatched ability in some of the most complex areas of the fixed-income markets. He has provided crucial market analysis and strategic investment management advice to institutional investors, particularly in the esoteric structured finance area. [The petitioner] truly possesses an unmatched skill in attracting important foreign investments, particularly in South and Central America, to the U.S. capital market.

ADP has frequently relied on [the petitioner] for investment recommendations for our portfolio of over $15 Billion in bonds. . . . [The petitioner] plays a central role in advising ADP to invest in U.S. corporate bonds, asset-backed securities, U.S. Treasuries, agency bonds, and money market instruments.

The petitioner submitted copies of agendas showing that he spoke at three seminars presented by Wachovia in Miami and 2005 and 2006. We note that the cover page of one agenda shows the dates as "June 6th through June 10th 2005," but the body of the agenda lists events from "Monday, June 5th" through "Friday, June 9th." Those dates correspond to 2006 rather than 2005. The agenda referred to both Tuesday and Wednesday as "June 7th." These agendas show that the petitioner has been active within the company that employs him, but they do not intrinsically indicate that the petitioner is a major

authority in his field rather than simply a ranking Wachovia employee who was already in the Miami area.

The director denied the petition on May 7, 2009. The director acknowledged the intrinsic merit and national scope of the petitioner's occupation, but found that the petitioner had submitted no objective, documentary evidence of his impact or influence on his field. On appeal, the petitioner submits new background documentation regarding the intrinsic merit and national scope of foreign investment. Because these factors are not in dispute, we need not discuss the background evidence in detail.

In the appellate brief, counsel stated: "There was nothing in the file to indicate . . . ineligibility," and that the director failed to give due consideration "to the real and significant evidence of the petitioner's eligibility that was submitted with the petition."

In the appellate brief, counsel quoted from previously submitted witness letters and stated: "The testimonial evidence demonstrates that the petitioner has been acclaimed nationally and internationally by experts in his field."

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)).

In this instance, the petitioner submitted no objective documentary evidence to support the claims in the above letters. Witnesses have claimed that the petitioner is a well-known figure in his field, but the record does not indicate that any evidence of his reputation existed anywhere before the petitioner solicited the witness letters in 2006.

Referring to the three seminars documented in the initial submission, counsel stated: "Petitioner has had the opportunity to display his expertise by being selected to present the business strategies he has developed to potential clients. . . . These seminars were imparted to large groups of very sophisticated Latin American institutional investors." The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The waiver claim relies in part on the assertion that the petitioner's familiarity with "investor habits in Latin America" is a qualifying factor. Special or unusual knowledge or training, while perhaps attractive to the prospective U.S. employer, does not inherently meet the national interest threshold.

The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *Matter of New York State Dept. of Transportation* at 221. One rejected argument in that precedent decision was that the alien's familiarity with the metric system would ease the department's transition to metric measurements. This assertion failed in part because "the metric system is accepted as the standard throughout most of the industrialized world, and is therefore commonly known among alien engineers." *Id.* at 221. We see a parallel in this proceeding, in which the beneficiary's Latin American origin is said to confer a presumptive advantage due to what are claimed to be different "investor habits in Latin America."

The petitioner submits copies of Internal Revenue Service Form W-2 Wage and Tax Statements showing that Wachovia paid him $244,381.67 in 2006 and $283,102.80 in 2007. (The petitioner did not submit a copy of his W-2 for 2008, although that form would have been available when the appeal was filed in mid-2009, after the April 15 income tax filing deadline.) Counsel states:

> The attached salary surveys from Salary.com for the closely related position of Senior Fixed Income Analyst show that a professional compensated in the top 10% of this position can expect to earn total compensation (salary and bonus) of $101,340. Clearly, the petitioner's compensation at the time of the filing of his petition supports the argument that he is an extraordinary professional in his field.

High compensation can form part, but not all, of a claim of exceptional ability in business. *See* 8 C.F.R. § 204.5(k)(3)(ii)(D). Because, by statute, aliens of exceptional ability remain subject to the job offer requirement, evidence of exceptional ability does not facially establish eligibility for the waiver.

Furthermore, the evidence submitted admittedly corresponds not to the petitioner's position, but to what counsel calls a "closely related position." The printout submitted on appeal shows a list of "related" "[o]ther job titles," including "Accountant" and "Accounting Clerk." The wide range of "related" occupations suggests that there could be a very wide salary range. Counsel, on appeal, states: "When his petition was filed, petitioner was a Vice President in the Fixed Income Institutional Group with Wachovia Capital Markets." The petitioner did not submit salary range information for vice presidents of major financial corporations.

We note that, at the time of filing, the petitioner did not claim the title of vice president, and Axel Rivera, the only witness from Wachovia, did not refer to the petitioner by that title. If he was a vice president, but chose for whatever reason not to disclose that face, then it is inappropriate to compare his compensation to that of a lower-level employee. If, on the other hand, the petitioner was not a vice president, then the appeal brief contains a false assertion.

We agree with the director that the petitioner's initial submission was insufficient to establish eligibility for the waiver. The petitioner's appeal adds little to the record apart from unsubstantiated claims and self-serving interpretations of previous submissions.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This decision is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.